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IN THE
Supreme Court of the United States

October Term 1969
No. 387

CALIFORNIA,

Petitioner,

vs.

JOHN ANTHONY GREEN,

Respondent.

On Writ of Certiorari to the Supreme Court of the
State of California.

PETITIONER'S REPLY BRIEF

Introduction

Petitioner will only briefly reply to the matters set forth in the respondent's brief, relying primarily on the arguments in the Opening Brief and in the Brief of the United States as Amicus Curiae.

The petitioner argued in the Opening Brief that the defendant in the instant case was confronted with the witnesses against him when he had an opportunity at trial, which he exercised, of cross-examining the witness whose prior inconsistent statements were received in evidence. In disputing this contention respondent states ((Br. for Resp. p. 12) "Since respondent was denied contemporaneous cross-examination before the trier of fact as the statements that convicted him were in-

troduced, he was denied his right of confrontation under the Sixth Amendment to the United States Constitution." He then argued (Br. for Resp. pp. 12-13) that the decisions of this court, including *Pointer*, 380 U.S. 400, and *Barber*, 390 U.S. 719, "clearly require *contemporaneous* confrontation and cross-examination before the trier of fact." (Emphasis added.)

By this argument he attempts to support the Supreme Court of California. However, he does not tell us where the word "contemporaneous" comes from. It clearly is not from the Sixth Amendment. It was not contained in *Pointer*.

In *Barber*, the holding was that confrontation includes both the opportunity to cross-examine the witness and the occasion for the trier of fact to weigh the demeanor of the witness. There is nothing in the Sixth Amendment or the recent cases of this court that requires a "contemporaneous utterance" by the declarant before the trier of fact. The right of confrontation makes the declarant available to the defendant to cross-examine and places him before the trier of fact in order to afford the jury the occasion to weigh the demeanor of the witness. Any other considerations should go to the polities to be utilized in fashioning rules of evidence.

Factual Considerations

In the instant case it is not denied that the declarant whose prior statements are in issue confronted the respondent at the trial, was subject to cross-examination during the People's case in chief and also as part of the respondent's case; that the declarant was present in court with the respondent and that the trier of fact

(the trial judge) was afforded an adequate opportunity to assess the credibility of the witness. (See Opening Brief, pp. 4-8.)

There is no question that the minor in this case was furnished a narcotic (marijuana) and the People's case established the respondent as the source of this narcotic. The witness was cross-examined as to his statements and the respondent was afforded the opportunity for further cross-examination after the People's case had closed.

Respondent has observed that the testimony at the preliminary and the statement to Officer Wade differed in respect to whether the narcotic had been brought over to Porter's house by Green or whether Green had merely pointed it out and Porter had gotten it at Green's parents house. The respondent, as he may properly do, has referred to the Reporter's Transcript of the Preliminary Hearing which is part of the record before this Court. Petitioner also would note that at the preliminary hearing, where the respondent was afforded the opportunity for cross-examination with counsel, counsel asked the witness Porter if he had ever previously told the officers that he picked up the sack of marijuana at Green's parents house. (Preliminary Transcript p. 28, line 14 to p. 29, line 1.) Porter replied that he only said he got it from him. At the trial Green was afforded ample opportunity to probe into this matter and to bring this to the attention of the trial court, if he so desired. This portion of the preliminary hearing record was not read to the court. However, contrary to the footnote in the California Supreme Court's opinion, Appendix, p. 112, and the statement page 14, Resp. Br., a significant part of the cross-

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examination of Porter at the preliminary hearing was read to the court. (Appendix pp. 18-22.)

The trier of fact did not have to accept all of the testimony of any witness as the gospel truth. He was certainly in a position to judge of the credibility of the witness Porter, as of all other witnesses at the trial, and to reject testimony determined to be unworthy of belief. This court should not be induced by speculative arguments to attempt to reweigh the testimony and determine its worth. In an attempt to have this court reject the testimony of Porter attention is called to his statements in court of the use of LSD. It must be noted that when the court asked Porter if it was the use of LSD that made his memory bad, Porter answered "No, I have always had a not very good memory." (Appendix, p. 26.) And officer Wade's testimony was that Porter was sober (Appendix, p. 42); that in the officer's opinion he was not under the influence of LSD when he made the statement of January 31, 1967 (Appendix pp. 38-39); that Porter was "acting normal like you and I." (Appendix p. 40.)

The Orthodox View of Common Law Evidentiary Rules Should Not Be Declared a Command of the Constitution

Petitioner will not elaborate on the development of the right of confrontation and of the rules against hearsay set forth in the briefs of the parties herein and in the Amicus brief. It is sufficient to note that it has been suggested that insofar as the confrontation clause and the hearsay evidence rules protect criminal defendants they have generally been treated as though

coextensive although they have not been held to overlap: It has been noted that a possible distinction is apparent: confrontation is limited to the right to confront the witness in the presence of the jury; hearsay is primarily concerned with the reliability of out of court statements whose admissibility is not dependant on whether the declarant testifies in court.

82 Harv. L.R. pp. 236-237.

Petitioner submits that the arguments for and against the orthodox view which holds previous inconsistent statements of a witness only admissible to impeach and not evidence of the facts stated are not arguments to the constitutional issue herein. Much of the authority and arguments set forth in respondent's brief, including the "Practical Results of Adopting the State's Position" (Resp. Br. pp. 40-51), are of this nature. (See discussion of *Bridges v. Wixon*, 326 U.S. 135 in Amicus Brief, pp. 21-23, 28-29). This is true of *State v. Saporen*, 205 Minn. 358, 285 N.W. 898, quoted in Resp. Br. pp. 22-24. Although Minnesota has a constitutional provision on confrontation, the decision does not purport to introduce a constitutional straight jacket on the evidentiary issue. Professor McCormick, (Evidence, p. 81) summarizes the arguments in favor of the orthodox view as presented by Judge Stone in Saporen, and then refutes them in the counter-argument as follows:

"First, the oath and liability to punishment for perjury are wanting.

"This must be granted, and the question is whether the want is fatal in view of (1) the fact that the prior statement was nearer to the event,

and hence fresher in memory, than the present testimony and (2) the opportunity to cross-examine.

"Second, the 'principal virtue' of cross-examination 'is in its immediate application of the testing process.' There was ~~no~~ *immediate* opportunity of cross-examination of the previous statement.

"But another virtue of cross-examination is in its opportunity to require the witness to explain the discrepancies of conflicting statements, and when this process is afforded, it seems that the earlier statement should at least stand equal with the later.

"Third, the unrestricted use as evidence of impeaching statements would 'increase both temptation and opportunity for the manufacture of evidence.'

"But it must be remembered that this temptation exists almost equally under the orthodox rule, since the statements will come in to impeach and will be considered by the jury as evidence, regardless of contrary instructions, if there is an issue of fact to submit.

"Fourth, if the hearsay rule is satisfied as to prior contradictory statements, it is equally so as to statements consistent with his testimony, and would lead to their admission as substantive evidence, and this, presumably, he would argue, would still further open the door to the evil last mentioned, that of manufacturing evidence, by securing successive statements from the witnesses.

"To this it may be answered that the extension suggested seems a logical one, and it is accepted

in the provisions of the English Evidence Act of 1938 and the Uniform Rule. Such an extension may encourage further the early taking of written statements from the witnesses, and the securing so far as possible of additional statements on fact-questions later revealed in the progress of investigation. These practices, however, are precisely those followed by diligent parties and counsel under the present system. It is hard to see how the present inducements to unscrupulous parties to put pressure upon crucial witnesses to change their stories will be materially increased. If witnesses are induced by such an extension more often to put in writing their recollection of the facts, even though prodded thereto by interested parties, and if the statements are given consideration more nearly equal with the later testimony, it seems probable that on the whole the interests of truth will be served." (Footnotes omitted.)

The commentators in 15 Wayne Law Review, at pages 1090-1091, in discussing the Proposed Rules for the Federal Courts (Rule 8-01(c)(2) said,

"However, there are compelling reasons for admissibility as substantive evidence. The requirement that the declarant testify at the hearing, that he be available for cross-examination as to the prior statement, and that the prior statement be inconsistent with his testimony allows a complete exploration of both statements while the witness is on the stand. An opportunity exists for declarant to explain any inconsistency, while cross-examination respecting the prior statement will satisfy

any procedural or constitutional objections. The presence of the declarant in court makes possible the observation of his demeanor which will aid in evaluating his credibility. Under these circumstances the reasons for invoking the hearsay prohibition are not present.

"There is also reason to believe that the prior statement was most accurate because it was made nearer in time to the event than the present testimony. Clearness of memory would vary with the time lapse between the event, the inconsistent statement, and the testimony at the hearing. In addition, the greater the lapse of time, the greater the chance of distortion through corruption, false suggestion, intimidation, or sympathy." (Footnotes omitted.)

In discussing *People v. Johnson*, 68 Cal. 2d 646, 441 P. 2d 111, 68 Cal. Rptr. 599, upon which the California Supreme Court in *Green* relied in holding the Sixth Amendment violated, the commentator in 15 Wayne Law Review, p. 877, notes the fallacious premise upon which that case is based:

"The instant court notes that Pointer and Douglas require that Sixth Amendment standards be followed in the states, but refers to *Goings v. United States*, as authority for the proposition that the substantive use of prior inconsistent statements exceeds the limitations of the confrontation clause. However, *Goings* is not authority for such a proposition since the case was decided on common law evidentiary rules. The court merely adhered to the orthodox interpretation that the

hearsay rule precluded the substantive use of such statements. The only reference made to the confrontation clause is dictum contained in a footnote, implying that the Sixth Amendment may also exclude the substantive use of prior inconsistent statements. Unlike the circuit court in *Gatings*, which merely ruled on evidentiary rules applicable in federal courts, the Supreme Court, in *Douglas*, provides a *constitutional* evaluation of state evidentiary rules. The clear purport of that holding indicates that had the witness affirmed the extra-judicial statements as his, the statement would have been constitutionally admissible as substantive evidence, either in the form of a prior inconsistent statement or prior consistent statement depending on the witness' in-court testimony. The intended use of section 1235 in the principal case clearly satisfies the doctrine set forth in *Douglas*. Both witnesses acknowledged that they made the out-of-court statements and, therefore, the opportunity to cross-examine them on these statements was not only available but, in fact, extensively used."

In concluding that the holding in *Johnson* was specious the commentator said:

"While the instant court cites no relevant authority to affirm its position that section 1235 is unconstitutional, it does support its position that the statutory provision is the embodiment of a disputed hearsay rule exception. However, the hearsay rule with all its traditional interpretations is not under consideration since the legislature already resolved the issue. The issue under consid-

eration is the applicability of the confrontation rule. The guidelines set forth in *Douglas v. Alabama* clearly govern use of the statements involved in the principal case. The confrontation clause, as interpreted by Douglas, merely requires the opportunity, at some point, to cross-examine witnesses. When this opportunity is available, constitutional requirements are fulfilled. Perhaps the instant court's disapproval of the legislatures rejection of the traditional approach to the hearsay exception induced the attempt to find inherent factors mitigating against adequate confrontation. This approach only resulted in forcing the court's arguments to be comprised of irrelevant premises and, therefore specious conclusions."

In closing this brief petitioner submits that the dire predictions made by respondent as "practical results" of adopting the position of petitioner find no support in the authorities cited by respondent and have been rejected by the distinguished legal scholars who have advanced the "academic" view of this evidentiary question, by the learned judges and experienced trial lawyers who have studied the matter and whose conclusions are contained in the various legal journals cited by petitioner and amicus and by the committee on Proposed Rules for the Federal Courts and the Committee of the American College of Trial Lawyers. (See the Report of the Committee to Study the Proposed Rules of Evidence for the United States District Courts and Magistrates of the American College of Trial Lawyers, February, 1970, page 4.)

Conclusion

Petitioner joins with the United States as Amicus Curiae in submitting that the prior inconsistent statements in this case were constitutionally admissible and in requesting that this cause be remanded to the California Supreme Court for proceedings not inconsistent with this Honorable Court's opinion.

Respectfully submitted,

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